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No. 06-694

IN THE

Supreme Court of the United States

UNITED STATES, *Petitioner*,

v.

MICHAEL WILLIAMS, *Respondent*.

On Writ of Certiorari to the
United States Court of Appeals for Eleventh Circuit

AMICUS BRIEF FOR THE AMERICAN CENTER FOR LAW AND JUSTICE AND EIGHTEEN MEMBERS OF CONGRESS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI*

The American Center for Law and Justice (ACLJ) is a public interest law firm committed to insuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before this Court and lower federal courts, and Chief Counsel Jay Alan Sekulow has presented oral argument before this Court eleven times.

The ACLJ is dedicated to defending families against efforts to undermine their importance, integrity, and well-being. Moreover, the ACLJ is committed to supporting appropriate efforts by Congress and the States toward the creation and sustenance of a social order that supports the important work of families: the rearing and protection of children. The proper resolution of this case is a matter of substantial organizational concern to the American Center for Law and Justice because of the ACLJ's commitment to American families.

This brief is also filed on behalf of Senator Tom Coburn and Representatives J. Gresham Barrett, Marsha Blackburn, Tom Cole, John Culberson, John Doolittle, Tom Feeney, Luis G. Fortuno, Trent Franks, Virgil H. Goode, Bob Inglis, Sam Johnson, Steve King, Joseph R. Pitts, Lamar Smith, Timothy Walberg, Dave Weldon, and Lynn A. Westmoreland.

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* The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party in this case authored in whole or in part this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

These amici currently are members of the United States Senate and House of Representatives in the One Hundred Tenth Congress. The Senator and these Representatives believe that the court of appeals in *United States v. Williams*[1] misinterpreted the pandering provision of the PROTECT Act, and therefore urge this Court to reverse the decision below.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Eleventh Circuit erred in holding that the pandering provision of the PROTECT Act sweeps in noncommercial speech. Calling the online trading of child pornography "noncommercial," the court ignored the commercial essence of pandering, as well as this Court's precedents holding that determinations of whether speech is commercial must focus not on formulas but on the content and goal of the speech.

The framers of the Commerce Clause recognized bartering and trading as commercial endeavors. Accordingly, offers to swap, barter or sample child pornography are commercial speech. They are all focused on either present or future quid pro quo transactions like the one that occurred in this case, and like thousands of others that happen daily in the underworld of online child pornography. Even free offers to view child pornography perpetuate the market for this highly addictive substance, much like offers of free cigarettes bolster the market for tobacco products. Any effective effort to dry up the market for child pornography must encompass pandering speech that offers samples or trades.

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[1] 444 F.3d 1286 (11th Cir. 2006).

The court of appeals' decision construing the pandering provision of the PROTECT Act as a restriction on noncommercial speech also violates the canon of constitutional avoidance. This Court's precedents require Congressional enactments to be interpreted to avoid constitutional difficulties. Ignoring the plainly stated purposes of the pandering provision, the court of appeals imagined hypothetical scenarios under which the pandering provision might restrict the political advocacy of pedophilia or child pornography. Congress's purpose for the pandering provision was to combat trafficking in child pornography by punishing those who pander it. The provision has no bearing on promotional speech that does not sink to the level of pandering. Properly construed to avoid constitutional questions, the pandering provision is a restriction on commercial speech alone.

The court of appeals further erred in holding that misleading panders are noncommercial speech protected by the First Amendment. This Court has never held that false statements of fact about unlawful activity are protected speech, any more than false advertising in other contexts. Untrue statements offering or promoting materials as obscene or actual child pornography find no refuge in the First Amendment, and it does not matter whether the speaker is mendacious or deluded about the nature or existence of the materials.

Because the pandering provision is a restriction on commercial speech, the Court of Appeals erred in subjecting the pandering provision to overbreadth analysis. The pandering provision passes constitutional muster under this Court's commercial speech cases because it is narrowly drawn to serve the compelling governmental interest in eradicating the market for child pornography.

ARGUMENT

I. THE COURT OF APPEALS' DECISION SHOULD BE REVERSED BECAUSE IT WRONGLY HELD THAT THE PANDERING PROVISION OF THE PROTECT ACT RESTRICTS NONCOMMERCIAL SPEECH.

At the heart of the court of appeals' judgment striking down the pandering provision of 18 U.S.C. §2252A(a)(3)(B)[2] was the erroneous conclusion that the pandering provision restricts noncommercial speech. 444 F.3d at 1298. The court imported a noncommercial gloss to the terms of the statute even though those terms are commonly associated with commercial activity, and Congress clearly intended them to have a commercial meaning alone. In ruling that the pandering provision sweeps in noncommercial speech, the court adopted an unduly narrow view of "commercial speech" that ignores the

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[2] The pandering provision of the PROTECT Act provides that any person who knowingly

> (B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains
>
> --
>
> (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
>
> (ii) a visual depiction of an actual minor engaging in sexually explicit conduct

commits a criminal offense. 18 U.S.C. § 2252A(a)(3)(B).

transactional reality of child pornography on the Internet and lacks support in this Court's precedents. Because the court erred in holding that §2252A(a)(3)(B) sweeps in noncommercial speech, it mistakenly applied the overbreadth doctrine to the statute.

A. The Court of Appeals Erred in Viewing the Offers to Trade Sexually Explicit Materials as Noncommercial Speech.

As occurred in this case, child pornography is often traded and exchanged on the Internet in addition to being bought and sold.[3] The court of appeals wrongly reasoned from this fact that such trafficking is noncommercial activity. The court referred to the "non-commercial setting, in which most child pornography is discussed and exchanged . . ." 444 F.3d at 1304. The court held that the pandering provision of the PROTECT Act extended to the "non-commercial promotion, presentation, distribution, and solicitation" of child pornography. *Id.* at 1298.

From the founding, commerce has always included trade and barter. The Framers of the Commerce Clause understood bartering and trading as commercial activity.

> At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, A Dictionary of the English

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[3] Offers to trade sexually explicit pictures of children is common practice in the underworld of Internet pornography. *See* L. Jill Rettinger, *The Relationship between Child Pornography and the Commission of Sexual Offences against Children: A Review of the Literature* (March 2000), *available at* http://www.justice.gc.ca/en/ps/rs/rep/2000/rr00-5.html.

> Language 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another, interchange of any thing; trade; traffick"); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) ("trade or traffic"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick"). This understanding finds support in the etymology of the word, which literally means "with merchandise." See 3 Oxford English Dictionary 552 (2d ed. 1989) (com – "with", merci – "merchandise"). In fact, when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably

United States v. Lopez, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring); *see also Gonzales v. Raich*, 545 U.S. 1, 58 (2005) (O'Conner, J., dissenting) (the term "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes").

Although there is much debate regarding how broad or narrow the term "commerce" should be interpreted, most scholars agree that "commerce" includes trade and exchange. *See* Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 116 (2001) ("[H]aving examined every use of the term 'commerce' that appears in the reports of the state ratification conventions, I found that the term was uniformly used to refer to trade or exchange"); Grant S. Nelson and Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 101 n.478 (1999)

(noting that "trade and exchange" is the core meaning of "commerce").

The Internal Revenue Service views bartering as taxable commercial activity. Specifically, income from bartering is taxable in the year in which the goods or services are received. The fair market value of goods and services exchanged must be included in the income of both parties. *See, e.g.*, Rev. Rul. 80-52, 1980-1 C.B. 100 (citing 26 USCS § 61).

The trading or swapping of sexually explicit pictures of minors is commercial activity no less than the trade of any other commodity. The same quid pro quo exchange occurs whether the currency is cash or in-kind goods and services. Congress enacted the pandering provision of the PROTECT Act to combat attempted quid pro quo transactions in child pornography. Prohibiting the attempted bartering of pornographic images on the internet is crucial in "dry[ing] up the market" for child pornography, which this Court recognized as a compelling interest in *New York v. Ferber*, 458 U.S. 747, 760 (1982).

Pandering is therefore, at its core, commercial speech. This Court has defined "pandering" as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." *Pinkus v. United States*, 436 U.S. 293, 303 (1978) (quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966)). Thus, whether it involves prostitution or sexually explicit materials, the goal of those who pander is to propose a present or future commercial transaction.

The essence of commercial speech is "speech proposing

a commercial transaction." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980). The Court has not limited commercial speech, however, to purchase and sales offers, but also has included speech that promotes the goal of a future transaction. Thus, statements about a product, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-482 (1995), and about professional qualifications, *Ibanez v. Florida Dept. of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994), qualify as commercial speech. In *Bolger v. Youngs Drug Products Corporation*, 463 U.S. 60 (1983), the Court held that promotional advertisements for contraceptives were commercial speech even though they did not specifically propose a commercial transaction. Finding that the materials were advertisements that referred to a specific product and that the sender had an economic motivation for sending them was sufficient to support the conclusion that the promotional ads were commercial speech. *Id.* at 66-68. The Court further added that it did not "mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial." *Id.* at 68.

Thus, this Court has resisted rigid formulas in defining commercial speech, looking instead at the content and context of the speech in determining its commercial character. *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("ambiguities may exist at the margins of the category of commercial speech"); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category").

Because trading or swapping sexually explicit images is essentially commercial activity, the Court's precedents defining commercial speech support the conclusion that the

pandering provision of § 2252A(a)(3)(B) restricts commercial speech alone, even if no money ever changes hands. The pandering provision bars offers to buy, sell, trade, or sample child pornography, all of which help drive the market. In light of the way pedophiles and traders in child pornography collections operate—through systems of trading and bartering for larger and "better" collections—even ads offering sexually explicit pictures for free are intended to draw pedophiles in, much like free food samples draw customers into restaurants, or more aptly, free cigarettes entice teenagers to smoke. The child pornography business is an addiction-driven business that is perpetuated by ensnaring the vulnerable with cost-free introductions.[4] It is naïve to think that free promotional offers of child pornography constitute noncommercial speech. The only kinds of persons engaged in the speech that Congress intended § 2252A(a)(3)(B) to proscribe are motivated by the hope of a present or future transaction to feed an insatiable addiction.[5]

B. The Court of Appeals Wrongly Held That the First Amendment Protects Misleading Statements About the Nature or Existence of Sexually Explicit Materials.

After concluding that § 2252A(a)(3)(B) restricts noncommercial speech, the court of appeals held that the pandering provision violated the First Amendment because it

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[4] Victor B. Cline, *Pornography's Effects on Adults and Children*, *available at* http://www.obscenitycrimes.org/clincart.cfm (last visited Apr. 17, 2007); R.J. McGuire, et al., *Sexual Deviation as Conditioned Behavior*, 2 Behavior Research and Therapy 1, 185 (1965).

[5] McGuire et al., *supra* note 4, at 185.

banned "noncommercial" offers or promotions of "purported" child pornography. 444 F.3d at 1298-1300, 1307. The court was concerned that the statute might punish statements offering virtual child pornography as real child pornography or innocent pictures of children as sexually explicit. 444 F.3d at 1306-07.

Offers of "purported" child pornography that is either "lawful," innocuous, or nonexistent are nothing more than misleading panders. They deserve no protection from the First Amendment. Indeed, "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Va. Pharm. Bd. v. Va. Consumer Council*, 425 U.S. 748, 771 (1976); *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985) (when speech "concerns no public issue" and is "wholly false and clearly damaging," it "warrants no special protection" under the First Amendment); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.")

Whether careless, delusional, or intentional, false statements of fact about material that is represented as child pornography belong to that "category of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Thus, whether misleading panders of child pornography are viewed as commercial speech or noncommercial speech, they should not be protected under the First Amendment.

II. THE COURT OF APPEALS VIOLATED THE CANON OF CONSTITUTIONAL AVOIDANCE IN HOLDING THAT § 2252A(a)(3)(B) RESTRICTS NONCOMMERCIAL SPEECH.

Even if § 2252A(a)(3)(B) arguably could be interpreted to restrict some noncommercial speech, the court of appeals' decision to do so, in the face of a plausible, narrower construction, violated the canon of constitutional avoidance.

This Court has frequently recognized that a decision to declare an Act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). A ruling of facial invalidity "frustrates the intent of the elected representatives of the people." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006). Thus, "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 127 S. Ct. 1610, 2007 U.S. LEXIS 4338, *52 (2007) (quoting *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Additionally, the statute should be interpreted so "as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Respect for Congress, and the presumption that Congress legislates in the light of constitutional limitations is the driving force behind the canon of constitutional avoidance. *Id.*

Applying the canon of constitutional avoidance often requires examining Congress's purpose for enacting the statute in question. For example, in *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971), the Court held

that Congress's purpose in enacting an obscenity law would be frustrated if time limits for judicial review were not read into the law. *Thirty-Seven (37) Photographs* involved a facial challenge to a federal law prohibiting the importation of obscenity into the United States. The statute authorized customs officials to seize obscene materials but did not provide explicit time limits for prompt judicial review as required by this Court's previous precedent. *Id.* at 367.

Guiding the Court was the principle of constitutional avoidance: "when the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* at 369.

Various statements made during Congressional debates demonstrated a clear concern for promptness of judicial review. *Id.* at 370. "Fidelity to Congress's purpose" therefore justified the Court's reading explicit time limits into the statute. *Id.* at 372. It was thus "possible to construe the section to bring it in harmony with constitutional requirements." *Id.* at 369; *see also Gonzales v. Carhart*, 127 S. Ct. 1610, 2007 U.S. LEXIS 4338, *52 (2007) (canon of constitutional avoidance required Court to read abortion statute to exclude D&E abortions); *Nat'l Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (principle of constitutional avoidance warranted holding that Congress did not intend National Labor Relations Act to apply to teachers in religious schools, even though statute could legitimately be read to extend the law's jurisdiction over parochial school teachers, thereby raising serious concerns under the Religion Clauses); *Shapiro v. United States*, 335 U.S. 1, 32 (1948) ("well-settled doctrine" requires Court to interpret the terms of a statute "in the

manner which effectuates rather than frustrates the major purpose of the legislative draftsmen").

The principle of constitutional avoidance requires similar deference to Congress' clearly stated purpose in this case. Congress could not have been more clear that the pandering provision of 18 U.S.C. § 2252A(a)(3)(B) was intended to be a restriction on commercial speech. By enacting the pandering provision, Congress sought to "ban[] . . . the offer to transact . . . this unprotected material, coupled with proof of the offender's specific intent. Thus, for example, this provision prohibits an individual from offering to distribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography." S. Rep. No. 108-2, at 12 (2003).

Congress stressed that the pandering provision targeted those "who wish to traffic in child pornography," meaning "only those individuals who are seeking to obtain illicit child pornography, or those individuals who are attempting to profit from the real or purported sale of illicit child pornography." *Id.* at 10.

In its findings, Congress stated that the PROTECT Act's purpose was "to stamp out the vice of child pornography at all levels in the *distribution* chain." PROTECT Act of 2003, Pub. L. No. 108-21, § 501(2), 117 Stat. 650, 676 (2003) (codified as amended at 18 U.S.C. § 2251)) (emphasis added). Quoting this Court's decision in *New York v. Ferber*, 458 U.S. 747, 760 (1982), Congress also articulated the goal of "'dry[ing] up the *market* for [child pornography] by imposing severe criminal penalties on persons *selling, advertising, or otherwise promoting the product.*'" *Id.* at § 501(3) (emphasis added).

Despite this evidence that Congress sought only to

restrict commercial speech, the court of appeals read § 2252A(a)(3)(B) to prohibit noncommercial "promotion" of non-obscene sexually explicit material. Specifically, the court imagined the statute could be used to criminalize social or political advocacy of child pornography. 444 F.3d at 1301-02. In so doing, the court conferred a meaning on the words "promote," and "advertise" different than that intended by Congress, as evidenced by Congress's clear statements that the pandering provision was aimed at the commercial trafficking of child pornography. Both "promote" and "advertise" are commonly associated with commercial activity. *See, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 361 (2002) (promoting of compounded drugs was commercial speech); *San Francisco Arts & Ath. v. United States Olympic Comm.*, 483 U.S. 522, 535 (1987) (use of the term "Olympic" in advertisements to promote goods, services and events, was commercial speech); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (informational advertisements for contraceptives were commercial speech).

This Court cautioned recently against an "antagonistic canon of construction under which . . . a permissible reading of a statute [is] to be avoided at all costs." *See Carhart*, 127 S. Ct. 1610, 2007 U.S. LEXIS at *53. The court of appeals' hypothetical musings about potential noncommercial applications of the pandering provision stand the canon of constitutional avoidance on its head. Unlike *Thirty-Seven (37) Photographs*, where new language was inserted into the law, all that is required here to save § 2252A(a)(3)(B) is that its terms be given their ordinary commercial meaning. Properly interpreted in accordance with the canon of constitutional avoidance, § 2252A(a)(3)(B) restricts commercial speech that panders child pornography.

III. UNDER THIS COURT'S COMMERCIAL SPEECH PRECEDENTS, § 2252A(a)(3)(B) POSES NO THREAT TO THE FIRST AMENDMENT.

As a restriction on commercial speech, §2252A(a)(3)(B) is appropriately analyzed under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980) and its progeny. "Commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

Thus, laws burdening commercial speech will be upheld if they directly advance a substantial governmental interest and are narrowly tailored to achieve the government's goal. *Central Hudson*, 447 U.S. at 566; *see also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634-35 (1995). The government is not limited in the evidence it may use to meet its burden. For example, a commercial speech regulation may be justified by anecdotes, history, consensus, or simple common sense. *Fla. Bar*, 515 U.S. at 628. Importantly, the overbreadth doctrine does not apply to restrictions on commercial speech. *Bd. of Trs. of State Univ. N.Y. v. Fox*, 492 U.S. 469, 477-81 (1978). The Eleventh Circuit therefore erred in applying the overbreadth doctrine to this case.

Section § 2252A(a)(3)(B) furthers a state interest of surpassing importance – protecting children from those who exploit them, including child molesters and child pornographers. *See New York v. Ferber*, 458 U.S. 747, 757 (1982); *Osborne v. Ohio*, 495 U.S. 103, 110 (1990) (stating

that the government's compelling interest extends to stamping out child pornography at all levels of the distribution chain). The most effective means of achieving the state's interest is to "dry up the market" for child pornography by "imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Ferber*, 458 U.S. at 760.

A reasonable fit exists between § 2252A(a)(3)(B) and these compelling interests. The "narrowly tailored" standard does not require that the government's effort to protect substantial interests be the least restrictive measure available. All that is required is a proportional response. *Hudson*, 447 U.S. at 564-65; *Fox*, 492 U.S. at 480. The pandering provision directly advances the government's interest by criminalizing both online and off-line attempts to buy, sell, trade, or sample child pornography, all of which are core components of the market. To be effective, any measures aimed at the proliferation of online child pornography must necessarily target solicitations and offers to swap child pornography.

Properly construed, § 2252A(a)(3)(B) does not apply to the social or political advocacy of child pornography. The statute has nothing whatsoever to do with the right of groups like the North American Man-Boy Love Association to promote the (horribly misguided) view that pedophilia is acceptable.

In sum, § 2252A(a)(3)(B) is narrowly tailored to serve the most compelling of governmental interests. As a prohibition on the commercial speech of pandering, it is fully consonant with the First Amendment.

CONCLUSION

This Court should reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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